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No. 91-836

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNION BANK OF SWITZERLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in ordering petitioner to comply with a grand jury subpoena for bank records held by its Panamanian subsidiary, and in holding petitioner in contempt for failing to obey the subpoena.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962)	14
Branzburg v. *Hayes*, 408 U.S. 665 (1972)	11
Grand Jury Proceedings, In re, 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976)	12
Grand Jury Proceedings, In re, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983)	5, 7, 8, 11-12
Grand Jury Proceedings (Bank of Nova Scotia), In re, 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985)	7, 8, 11
Sealed Case, In re, 825 F.2d 494 (D.C. Cir.), cert. denied, 484 U.S. 963 (1987)	8, 9
Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. *Rogers*, 357 U.S. 197 (1958)	12
Société Nationale Industrielle Aérospatiale v. *United States District Court*, 482 U.S. 522 (1987)	12
United States v. *First National Bank*, 699 F.2d 341 (7th Cir. 1983)	10, 12
United States v. *Hayes*, 722 F.2d 723 (11th Cir. 1984)	15
United States v. *R. Enterprises, Inc.*, 111 S. Ct. 722 (1991)	12, 13
United States v. *Ryan*, 402 U.S. 530 (1971)	15, 16
United States v. *Vetco, Inc.*, 691 F.2d 1281 (9th Cir.), cert. denied, 454 U.S. 1098 (1981)	12

Statutes and rule: Page

Panama Cabinet Decree 238 3
Code of Commerce of the Republic of Panama Art. 89 ..... 3, 14
Panama Law No. 18 ..... 3, 15
Art. 4 15
Art. 5 14
Art. 170 3
11th Cir. R. 36-1 8

Miscellaneous:

Restatement (Second) of Foreign Relations Law of the United States (1965) 3-4, 7-8, 10
Restatement (Third) of Foreign Relations Law of the United States (1987) 3, 16
United States Attorneys' Manual 4

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1) is unreported, but the judgment is noted at 946 F.2d 904 (Table). The orders of the district court (Pet. App. A3-A4, A8-A10) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1991. A petition for rehearing was denied on November 15, 1991. Pet. App. A2. The petition for a writ of certiorari was filed on November 21, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Swiss bank that conducts business in 21 countries through branch or representative offices. UBS Quashal Memo. 4-5. Petitioner has one representative office and four branches in the United States. *Id.* at 5. Petitioner also has subsidiaries in ten countries, including a wholly owned Panamanian subsidiary, Union de Bancos Suizos, Panama, S.A. (UBS (Panama)). *Ibid.* UBS (Panama) ceased operations on December 31, 1990, and is winding up its affairs. Suarez Aff. 4-5.

On February 1, 1991, a federal grand jury in the Southern District of Florida issued a subpoena *duces tecum* to petitioner, ordering it to produce certain records concerning Panamanian bank accounts maintained by UBS (Panama). Gov't Enf. Memo. 1-2. The subpoena was served on petitioner's branch office in New York. *Id.* at 2. The subpoena directed petitioner to produce the records on or before February 20, 1991. *Ibid.* At petitioner's request, the United States Attorney agreed to extend the time to comply with the subpoena until March 6, 1991. *Ibid.* The records sought by the grand jury are relevant to an investigation of possible criminal violations of the federal tax laws. Jackson Aff. 1-2.[1]

On March 5, 1991, petitioner filed a motion to quash the subpoena. Petitioner asserted that, if it complied with the subpoena, UBS (Panama) and its officials would be subject to criminal prosecution un-

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[1] Christine Jackson, an IRS special agent who is assisting the grand jury in its investigation, filed an affidavit under seal setting forth certain details of the grand jury's investigation.

der Panamanian law. UBS Quashal Memo. 4, 10-14. To support this assertion, petitioner filed an affidavit of the secretary of UBS (Panama), Gabriel Suarez. Suarez stated that if petitioner or UBS (Panama) were to comply with the subpoena, the responsible individuals would be subject to imprisonment and fines under Law Number 18 (Pet. App. A11-A13), Cabinet Decree 238 (Pet. App. A15-A17), and Article 170 of the Criminal Code of the Republic of Panama (Pet. App. A18). Suarez Aff. 5-8. Citing Article 89 of the Code of Commerce of the Republic of Panama (Pet. App. A19-A20), Suarez further stated that "Panamanian law *specifically* provides that it is unlawful to produce documents in compliance with an order of a foreign authority." Suarez Aff. 9. Suarez also referred to a case in which UBS bank employees were facing criminal charges for alleged wrongful disclosure of bank records. Suarez Aff. 10-11.

In response, the government filed a memorandum analyzing the facts of this case in light of the balancing analysis set forth in Section 442(1)(c) of the Restatement (Third) of Foreign Relations Law of the United States (1987),[2] and Section 40 of the Re-

[2] Section 442(1)(c) of the Restatement (Third) states:

> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

statement (Second) of Foreign Relations Law of the United States (1965). Gov't Enf. Memo. 7-23.[3]

The government also submitted an affidavit of the Director of the Office of International Affairs (OIA) of the United States Department of Justice. The OIA reviews requests from federal prosecutors to issue subpoenas calling for the production of records located in foreign countries.[4] In reviewing the United States

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[3] Section 40 of the Restatement (Second) states:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

[4] The OIA's review is conducted pursuant to guidelines set forth in Section 9-13.525 (formerly Section 9-4.543) of the United States Attorneys' Manual, which require consideration of:

1. The availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory;
2. The indispensability of the records to the success of the investigation or prosecution; and
3. The need to protect against the destruction of records located abroad and to protect the United States'

Attorney's request in this case, the OIA considered whether alternative methods for obtaining the bank records were available. Arena Aff. 2. The OIA concluded that there are no mutual legal assistance treaties, tax treaties, or other similar agreements currently in force between the United States and Panama.[5] Moreover, Panamanian officials have informed the OIA that Panama does not recognize letters rogatory as an appropriate means for obtaining assistance in criminal matters. *Id.* at 3. And Panamanian officials have stated, both publicly and in private discussions with representatives of the United States, that Panama will not provide legal assistance for use in criminal investigations, proceedings, or prosecutions focusing only on "pure tax" offenses. *Id.* at 3-4. Based on the OIA's recommendation, a Deputy Assistant Attorney General approved issuance of the subpoena. *Id.* at 2.

2. On April 3, 1991, the district court denied petitioner's motion to quash the subpoena. Pet. App. A8-A10. Relying on the Eleventh Circuit's decision in *In re Grand Jury Proceedings*, 691 F.2d 1384 (1982), cert. denied, 462 U.S. 1119 (1983), the court rejected petitioner's contention that issuance of an order compelling compliance with the subpoena would vio-

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ability to prosecute for contempt or obstruction of justice for such destruction.

[5] Although the United States and Panama have signed a mutual legal assistance treaty for use in criminal cases, the United States has not yet ratified the treaty, and there has been no exchange of diplomatic notes putting the treaty into effect. Thus, petitioner's contention (Pet. 6 n.3) that this "treaty has been formally ratified by the Republic of Panama, but the Government has refused to make use of it," is incorrect. In any event, the treaty does not apply to a pure tax investigation such as the present case.

late international law and principles of comity. After "careful review of the record," the court ordered petitioner to produce the subpoenaed documents within 20 days. Pet. App. A9. The court further ordered petitioner to "pay sanctions in the amount of ten thousand dollars per day for every day said documents are not produced," but stayed its order to permit petitioner to file a reply brief. *Ibid.* Petitioner thereafter filed a reply memorandum and several additional motions. On April 16, 1991, the district court denied petitioner's motions and lifted the stay. *Id.* at A3.

When petitioner failed to produce the records called for by the subpoena within the time allowed by the district court, the government filed a motion to show cause why petitioner should not be held in contempt. On June 20, 1991, following a hearing, the district court held petitioner in contempt and imposed sanctions in the amount of $10,000 per day for every day petitioner failed to comply with the court's order. Pet. App. A3-A4.

3. The court of appeals granted petitioner's motion to stay the district court's order pending appeal and ordered that the appeal be expedited. Pet. C.A. Br. 20. In challenging the district court's order before the court of appeals, petitioner contended, *inter alia*, that (1) petitioner did not have custody or control of the records and (2) the district court's orders violated principles of international law and comity. Pet. C.A. Br. 25-52. In the court of appeals, as in the district court, the government's brief discussed the factors quoted above from the Restatement (Second) and the Restatement (Third) of Foreign Relations Law of the United States. Gov't C.A. Br. 25-40.

On September 10, 1991, the court of appeals affirmed the district court's orders without opinion. Pet. App. A1. Petitioner sought a stay in this Court, and the government did not oppose that request. On December 2, 1991, the Court issued an order staying the judgment of the court of appeals pending the disposition of the petition for certiorari.

ARGUMENT

1. Petitioner contends (Pet. 9-15) that the Eleventh Circuit has adopted an "absolute rule" that foreign law is never a basis for quashing a grand jury subpoena, and that this rule conflicts with decisions of other courts of appeals. Contrary to petitioner's contention, the Eleventh Circuit has adopted no such rule, and the conflict posited by petitioner does not exist.

a. In *In re Grand Jury Proceedings*, 691 F.2d 1384, 1388-1389, 1391 (1982), cert. denied, 462 U.S. 1119 (1983) (*Bank of Nova Scotia I*), and *In re Grand Jury Proceedings* (*Bank of Nova Scotia*), 740 F.2d 817, 826-829 (1984), cert. denied, 469 U.S. 1106 (1985) (*Bank of Nova Scotia II*), the Eleventh Circuit rejected the proposition that a grand jury subpoena calling for production of foreign bank records should be quashed merely because compliance with the subpoena might subject the subpoenaed party to criminal sanctions in a foreign country. But the court did not adopt a blanket rule that motions to quash such subpoenas should be denied merely because the subpoenas were issued in the course of a grand jury investigation. Rather, in both cases, the Eleventh Circuit held that it is appropriate to follow the multi-factor balancing test set forth in Section 40 of the Restatement (Second) of Foreign

Relations Law of the United States (1965). Bank *of Nova Scotia I*, 691 F.2d at 1389; *Bank of Nova Scotia II*, 740 F.2d at 826-827. Thus, the relevant Eleventh Circuit precedents reject an "absolute rule" that grand jury subpoenas calling for production of records in a foreign country must be enforced regardless of the restrictions imposed under the laws of that country.

Contrary to petitioner's suggestion (Pet. 11), the court of appeals' summary affirmance in this case does not alter the law of the Eleventh Circuit. Under the rules of that court, disposition of an appeal by judgment order is appropriate only where an opinion would have no precedential value. See 11th Cir. R. 36-1. Absent any indication to the contrary, it must be presumed that the court followed circuit precedent and determined that enforcement of the subpoena at issue is consistent with principles of comity.

b. Petitioner is incorrect in asserting that the decision in this case conflicts with decisions of other courts of appeals. As explained above, there is no reason to believe that the court of appeals departed from the settled principles of law set out in its decisions in the *Bank of Nova Scotia* cases. And those cases are not in conflict with the cases relied on by petitioner.

In *In re Sealed Case*, 825 F.2d 494 (D.C. Cir.), cert. denied, 484 U.S. 963 (1987), the court of appeals held that the district court should not have entered a civil contempt order against a foreign bank that compelled the bank to act in violation of the laws of another foreign country. Although the panel commented that "it causes us considerable discomfort to think that a court of law should order a violation of

law, particularly on the territory of the sovereign whose law is in question," the court went out of its way to emphasize that it was not barring such orders in all cases. 825 F.2d at 498. The court stated (*ibid.*):

> We do not decide here the general issue of whether a court may ever order action in violation of foreign laws * * *. [H]ere we simply conclude that even if a court has the power to issue such contempt orders under certain circumstances, on the peculiar facts of this case the order should not have issued.

In summarizing its opinion, the court stated (*id.* at 499):

> [W]e emphasize again the limited nature of our holding on this issue. If any of the facts we rest on here were different, our holding could well be different. And though we reverse the district court's order holding the bank in civil contempt on the facts of this case, we of course intend no challenge to the proposition that the vital role of grand jury investigations in our criminal system endows the grand jury with wide discretion in seeking evidence.

One of the facts on which the panel relied was that the bank was "not merely a private foreign entity, but * * * an entity owned by the government of [a third country]." 825 F.2d at 498. That is not the case here and was not the situation in either of the *Bank of Nova Scotia* cases. Another factor on which the *Sealed Case* panel relied was the district court's specific finding "that the bank had acted in good faith throughout these proceedings." *Ibid.* As discussed below, pp. 15-16, *infra*, there is no indication that petitioner has made a good faith effort to comply with the subpoena.

Nor is there any conflict between the decision in this case and the Seventh Circuit's decision in *United States* v. *First National Bank*, 699 F.2d 341 (1983). In *First National Bank*, the district court granted enforcement of an IRS summons to the bank seeking production of certain records in the bank's branch in Athens, Greece. The records were sought in connection with IRS collection efforts. The court of appeals determined that the bank had demonstrated that compliance would subject its employees to substantial criminal penalties under Greek law. The court expressly recognized that a foreign bank secrecy law does not automatically bar a domestic court from compelling production of foreign bank records (699 F.2d at 345), but concluded that a balancing of the factors of Section 40 of the Restatement (Second) weighed against compelling immediate disclosure in that case. *Ibid.* The panel remanded the case to the district court to consider whether the bank should be directed to make a good faith effort to obtain permission to comply with the summons.

The Seventh Circuit expressly distinguished the Eleventh Circuit's decision in *Bank of Nova Scotia I*. In *Bank of Nova Scotia I*, unlike *First National Bank*, the bank had not made a good faith effort to comply with the subpoena. 699 F.2d at 347. In addition, the information in *Bank of Nova Scotia I* was sought by a grand jury conducting a tax and narcotics investigation. In contrast, *First National Bank* involved a civil collection proceeding. *Ibid.* Bahamian law (which was at issue in *Bank of Nova Scotia I*) permitted disclosure with the customer's consent, while the Greek law at issue in *First National Bank* did not; and Bahamian courts, unlike Greek courts, appeared to have significant authority to permit disclosure of

bank records. *Ibid.* (The differences in foreign law were relevant to whether "compliance with the request would undermine important interests of the state where the information is located." Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c) (1987)).

The distinctions the Seventh Circuit drew in *First National Bank* plainly apply to this case as well. Petitioner has conceded that Panamanian law permits disclosure of bank records with the customer's consent, and it also permits the disclosure of such records to Panamanian authorities in criminal proceedings. Pet. C.A. Br. 13-14; Pet. App. A12, A18. Thus, Panama has recognized that its interest in preserving the secrecy of bank records is not absolute. In addition, this case involves a grand jury investigation of possible criminal activity, a setting in which the interest in enforcing compliance with a subpoena is at its strongest. See *Branzburg* v. *Hayes*, 408 U.S. 665, 688, 700 (1972). Finally, petitioner has not made a good faith effort to obtain permission from Panamanian authorities to release the bank records. Indeed, there is no evidence that petitioner has done anything in response to the grand jury's subpoena other than to oppose it in the courts of the United States.

More generally, the Eleventh Circuit's approach in cases like this one is consistent with the decisions of other courts of appeals that have employed the fact-intensive balancing analysis set out in the Restatement (Second) and Restatement (Third) of Foreign Relations Law to determine whether a person may be ordered to disclose information in violation of the laws of a foreign country. See *Bank of Nova Scotia II*, 740 F.2d at 826-829 (balancing competing interests); *Bank of Nova Scotia I*, 691 F.2d at 1389

(adopting balancing test); *First National Bank*, 699 F.2d at 345 ("[W]hat is required is a sensitive balancing of the competing interests at stake."); *United States* v. *Vetco, Inc.*, 691 F.2d 1281, 1288 (9th Cir.) ("Courts must balance competing interests in determining whether foreign illegality ought to preclude enforcement of an IRS summons."), cert. denied, 454 U.S. 1098 (1981); *In re Grand Jury Proceedings*, 532 F.2d 404, 407 (5th Cir.) (determination "requires a balancing of * * * several factors"), cert. denied, 429 U.S. 940 (1976). No court of appeals has held that a foreign country's laws create an absolute bar to enforcement of a subpoena calling for documents located in that foreign country. Indeed, such a holding would be contrary to this Court's recognition that foreign confidentiality laws do not automatically deprive an American court of the power to order a party subject to its jurisdiction to produce evidence. *Société Internationale Pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 205-206 (1958). See also *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U.S. 522, 544 n.29 (1987).[6]

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[6] Petitioner suggests (Pet. 18) that the court of appeals' decision is in tension with this Court's decision in *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U.S. 522 (1987). But the *Aérospatiale* case concerned discovery under the Federal Rules of Civil Procedure rather than a grand jury subpoena. And the Court approved a balancing analysis similar to the one employed by the Eleventh Circuit in the *Bank of Nova Scotia* cases. See 482 U.S. at 543-546.

Petitioner is also incorrect in asserting (Pet. 16 n.10) that the court of appeals' decision is inconsistent with *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. 722 (1991). In *R. Enterprises*, the Court held that the burden of showing the unreasonableness of a grand jury subpoena is on the re-

2. Although petitioner is dissatisfied with the court of appeals' application of the balancing test in this case, no further review of that fact-bound determination is warranted. In any event, the court of appeals' application of the law to the facts of this case is reasonable and supports enforcement of the subpoena.

a. Petitioner contends (Pet. 12 n.8) that there are "simple, quick, inexpensive and lawful alternative means" by which the government could obtain the subpoenaed information from Panama. This contention ignores the record, which establishes that there is no alternative means of obtaining the subpoenaed documents. Petitioner claims (Pet. 6) that it is "undisputed" that the government could obtain the subpoenaed records by permitting UBS (Panama) to seek its customer's consent to disclosure, or, if necessary, by compelling the customer to consent. But the district court found that "there is reason to believe that notice to the customers of such inquiry would result in the destruction of evidence or seriously jeopardize the grand jury's investigation." Mar. 7, 1991, Order 1; June 12, 1991, Order 1-2. Thus, seeking the customers' consent to disclosure is not a viable alternative.

In addition, the government could not obtain legal assistance from the government of Panama. There

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cipient, and that a motion to quash challenging the subpoena on relevancy grounds "must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." 111 S. Ct. at 728. Here, the district court made findings that "there is reason to believe the records being sought are relevant to a legitimate law enforcement inquiry." Mar. 7, 1991, Order 1; June 12, 1991, Order 1.

are no mutual legal assistance treaties, tax treaties, or similar agreements currently in force between the United States and Panama, and the treaty that has been signed but not ratified does not apply to pure tax matters such as this case. See note 5, *supra*. Moreover, Panama does not recognize letters rogatory as an appropriate means for obtaining assistance in criminal matters, and Panamanian officials have stated that legal assistance will not be provided to the United States for use in criminal investigations focusing only on "pure tax" offenses. Arena Aff. 3.

b. Petitioner also argues (Pet. 12 n.8) that the Panamanian bank confidentiality laws allow only limited exceptions and thus express a strong state interest in prohibiting disclosure. Article 5 of Panamanian Law Number 18 expressly allows bank account information to be revealed to "investigating officers, judges and magistrates who hear criminal proceedings." Pet. App. A12. Thus, the Panamanian national interest in the confidentiality of bank accounts yields to criminal law enforcement. Accordingly, Panama's bank secrecy law is not so absolute that it should be deemed to outweigh the interest of the United States in investigating and prosecuting criminal violations of its tax laws.

Article 89 of the Code of Commerce of the Republic of Panama, on which petitioner relies, provides only for a fine of 100 Balboas (equivalent to $100), and makes no provision for imprisonment. Pet. App. A19-A20. In *Application of Chase Manhattan Bank*, 297 F.2d 611, 612 (2d Cir. 1962), the bank's expert witness on Panamanian law stated that Article 89 "is the only Panamanian law containing any sanctions with respect to production of records in response to foreign process, and that a violation of the Panamanian law

would be equivalent to a misdemeanor under our criminal law." That opinion was rendered despite the existence of Panamanian Law Number 18 (Pet. App. A11-A13), which petitioner claims is the leading bank secrecy statute for Panamanian numbered accounts. Suarez Aff. 6.

c. Petitioner also asserts (Pet. 12 n.8) that production of the documents called for by the subpoena would require petitioner or its representatives to commit crimes within the territorial confines of the Republic of Panama. But any violation of Panamanian law would be completed in the United States, not in Panama. Article 4 of Panamanian Law Number 18, which pertains to bank accounts, punishes bank personnel "who *reveal* or *disclose* to persons alien to the institutions and to the handling of these accounts any information with reference to the existence, balance or identity of the commitent of a coded bank account." Pet. App. A12 (emphasis added). Disclosure to the grand jury would occur in the United States.

Petitioner's reliance (Suarez Aff. 10-11) on a case in which bank employees are facing criminal charges in Panama for alleged wrongful disclosure of bank records is unpersuasive. In that case, the employees were accused (as a result of a private complaint) with misappropriation of funds, withdrawal of moneys owned by the complainants, and conspiracy. Suarez Aff., Exh. F. No such violations are at issue here.

d. Finally, a person ordered to obey a subpoena is "under a duty to make in good faith all reasonable efforts to comply with it." *United States* v. *Ryan*, 402 U.S. 530, 534 (1971). See also *United States* v. *Hayes*, 722 F.2d 723, 725-726 (11th Cir. 1984). One who claims that foreign law would punish his produc-

tion of foreign records must, at the very least, seek permission from the foreign authorities to produce the documents. *Ryan*, 402 U.S. at 534; Restatement (Third), § 442(2).[7]

Although petitioner asserts (Pet. 12 n.8, 14 n.9, 15) that it has made a good faith effort to comply with the subpoena, the record does not support that assertion. Petitioner has failed to ask Panamanian officials to allow disclosure and has failed to make any attempt to bring any form of legal action in Panama. Thus, petitioner has not demonstrated that the enforcement of the subpoena at issue and the sanctions imposed by the district court are inappropriate under principles of comity.[8]

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[7] Section 442(2) provides, in part:

> If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national,
>
> (a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;
>
> (b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or failure to make a good faith effort in accordance with paragraph (a).

[8] In his affidavit, the secretary of UBS (Panama) states (Suarez Aff. 4-5) that there is no procedure under Panamanian law by which UBS (Panama) could seek an order permitting disclosure. Petitioner, however, has failed to corroborate this claim with a statement by a disinterested

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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witness or current Panamanian official. Moreover, Suarez does not say that prosecutorial officials lack discretion to decline prosecutions under the confidentiality laws. Thus, it would appear that petitioner could seek an assurance from such officials that a prosecution would not be undertaken in light of the circumstances of this case. Petitioner has not shown that it has taken such action.

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